SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 320

WILLIAM M. HIYANE AND
ACRO CONTACT LENS SERVICE, INC.,
AN ILLINOIS CORPORATION,
Appellants,

vs.

THE HOUSE OF VISION, INC.,
A DELAWARE CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE SUPREME COURT OF
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JURISDICTIONAL STATEMENT.

The appellants, William M. Hiyane and Acro Contact Lens Service, Inc., an Illinois corporation, appeal from the final decree of the Supreme Court of Illinois entered on 29 January 1969, in respect to which a petition for rehearing was denied on 25 March 1969, affirming certain orders of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, dated 2 February 1968, 16 February 1968, and 23 February 1968. These orders denied defendants-appellants a hearing on their

suggestions of damages under the Illinois statute pertaining to injunctions; denied the defendants-appellants a hearing of their claims for damages as pleaded; and denied defendants-appellants indemnification of attorneys' fees, actual expenses and costs, as prayed for pursuant to the Ninth and Fourteenth Amendments to the Constitution of the United States.

The defendants-appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

The time for filing this Statement was enlarged to and including 23 July 1969.

OPINIONS BELOW.

The Circuit Court of Cook County, Illinois, rendered no opinion in this case.

Shortly after the complaint was filed, and after a hearing on a motion for temporary injunctive relief, there was an interlocutory appeal by the plaintiff to the Illinois Appellate Court, First District. This resulted in an opinion which is reported at 58 Ill. App. 2d 431; 208 N. E. 2d 390 (1965). The mandate of the Illinois Appellate Court appears at Record page 36.

Upon remand to the trial court, there was a full hearing on the merits which were decided in favor of the plaintiff on the issue of permanent injunctive relief against both defendants, and defendants appealed directly to the Illinois Supreme Court. This resulted in an opinion (R. 58) which is reported at 37 Ill. 2d 32, 225 N. E. 2d 21 (1967). The mandate of the Illinois Supreme Court appears at Record page 57.

Upon remand to the trial court, certain orders dated 2 February 1968 (R. 105, 107), 16 February 1968 (R. 111),

and 23 February 1968 (R. 118), were entered without opinion by the trial judge, dismissing the complaint for want of equity and taxing costs pursuant to the Illinois Supreme Court mandate (R. 57).

From the dismissal of the complaint without granting a hearing to defendants on the issue of their damages, defendants again appealed directly to the Illinois Supreme Court on constitutional grounds. This resulted in an opinion (R. 172) which is reported at 42 Ill. 2d 45, 245 N. E. 2d 468 (1969).

A petition for rehearing (R. 178) was filed and was denied (R. 179), without opinion.

The opinion of the Illinois Appellate Court, the two opinions of the Illinois Supreme Court, and the orders of 2 February 1968, 16 February 1968, and 23 February 1968, of the Circuit Court of Cook County, are set forth in Appendix A (A28-A31).

JURISDICTION.

The judgment involved in this appeal was entered in a suit for injunctive relief and monetary damages in the Circuit Court of Cook County, Illinois, County Department, Chancery Division. The Illinois Supreme Court held that, by reason of its mandate (on a previous appeal) which reversed a permanent injunction order in favor of the plaintiff, with directions "*to dismiss the complaint for want of equity and to assess the fees of the master in chancery and other costs against the plaintiff*" (R. 55, 60-61), the defendants-appellants were precluded thereafter from proceeding on the issue of their own statutory damages flowing from the preliminary injunction, or from the permanent injunction which was dissolved by the mandate, pursuant to the Illinois statute relating to damages upon dissolution of injunctions, Ill. Rev. Stat. (1967),

chapter 69, section 12. The Illinois Supreme Court held that defendants were also precluded from proceeding on the issue of their non-statutory damages flowing from the litigation itself, as originally raised in their answers to the complaint. The Illinois Supreme Court held that defendants were precluded from recovering indemnification of their attorneys' fees, actual expenses and costs, which the defendants claimed by virtue of the Ninth and Fourteenth Amendments to the Constitution of the United States. The Illinois Supreme Court also held that defendants could not amend their pleadings after the appeal was decided in their favor and remanded to the trial court, because of the language of this mandate.

Thus, the case involved a judgment by the highest court of a state in a case where the validity of a state statute was drawn into question as being repugnant to the Fourteenth Amendment, as interpreted and applied, and the decision was made in favor of its validity. The case also involved the validity of the mandate of the Illinois Supreme Court, in which it was decided by that same court that its mandate was not repugnant to the Fourteenth Amendment, as interpreted and applied in this case. The case also involved a judgment by the highest court of a state in a case where the validity of a state statute pertaining to court costs, and the validity of the Illinois Supreme Court Rules pertaining to costs, were drawn into question as being repugnant to the Ninth and Fourteenth Amendments to the Constitution of the United States, as interpreted and applied, and the decision was made in favor of validity. This Court, therefore, has jurisdiction under 28 U. S. Code, sections 1257 (2) and 2101 (c). *Lathrop* v. *Donohue*, 367 U. S. 820, 6 L. ed. 2d 1191 (1961); *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 77 L. ed. 730 (1933).

CONSTITUTIONAL STATUTORY AND RULES PROVISIONS INVOLVED.

The provisions of the federal Constitution which are involved are:

NINTH AMENDMENT:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

The provisions of the Constitution of the State of Illinois which are involved, are contained in Article II, sections 2 and 19, which provide:

> ART. II, Section 2. No person shall be deprived of life, liberty or property, without due process of law.
>
> ART. II, Section 19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

The statute of Illinois the validity of which is involved is the statute pertaining to injunctions, Ill. Rev. Stat. (1967), chapter 69. The entire statute is set out in Appendix B (A33-A40). The pertinent section thereof provides:

Section 12. *Assessing damages—Suit on bond.* In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond.

The statute of Illinois the application of which is involved also is the statute pertaining to civil procedure and practice, Ill. Rev. Stat. (1967), chapter 110, sections 46(1), 46(2), and 46(3), which provide:

Section 46. *Amendments.*

(1) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand.

(2) The cause of action, cross demand or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross demand interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though

the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving as aforesaid the cause of action, cross demand or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading, shall be held to relate back to the date of the filing of the original pleading so amended.

(3) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.

The statute of Illinois the application of which is involved also is the statute pertaining to civil practice in the courts, Ill. Rev. Stat. (1967), chapter 110, sections 2, 3 and 4, which are set out in Appendix B (A40, A41).

The statute of Illinois the validity of which is involved also is the statute pertaining to costs, Ill. Rev. Stat. (1967), chapter 33, sections 8 and 22, which are set out in Appendix B (A43).

The Rules of the Illinois Supreme Court (which are codified at Ill. Rev. Stat. (1967), chapter 110A), the application of which are involved, are Rules 208, 318, 330, 342(h), and 364, which are set out in Appendix B (A44-A47).

QUESTIONS PRESENTED.

Shortly after this suit was filed, plaintiff's motion for a preliminary injunction was granted by the trial court, and the preliminary injunction order was affirmed on interlocutory appeal to the Illinois Appellate Court prior to a hearing of the merits of the complaint. After a hearing of the merits on the issue of plaintiff's right to permanent injunctive relief, *pursuant to the Illinois Appellate Court's man-*

date, the trial court found all issues in favor of the plaintiff and entered a final and appealable permanent injunction order against the defendants, reserving the issue of damages for further hearing. Upon direct appeal, the Illinois Supreme Court *reversed* both the findings of all issues in favor of the plaintiff and also the permanent injunction orders against both defendants, and by its mandate directed the trial court *to dismiss the complaint for want of equity and to assess the fees of the master in chancery and other costs against the plaintiff*.

After remand to the trial court, defendants sought to have a hearing on the issue of their own damages, both statutory and equitable. This was denied. Defendants sought to have the trial court include attorneys' fees and actual expenses as part of taxable costs. This was denied. The questions presented are:

1. Whether the mandate of the Illinois Supreme Court, directing the trial court to dismiss the plaintiff's complaint for want of equity, deprived the trial court of further jurisdiction to hear defendants' claims for damages under the Illinois statute relating to injunctions, Ill. Rev. Stat. (1967), chapter 69, section 12; and deprived the trial court of further jurisdiction to hear defendants' claims for equitable damages and other relief, as pleaded and prayed for by them in their answers to the complaint; and deprived the trial court of further jurisdiction to permit defendants to amend their answers or file counterclaims in the cause before the case was finally disposed of; and, if this is the effect of that mandate, whether the mandate as thus applied and enforced is unconstitutional in that it deprives the defendants-appellants of due process of law and equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation of Illinois Constitution, Article II, sections 2 and 19.

2. Whether the Illinois statute relating to injunctions, Ill. Rev. Stat. (1967), chapter 69, is unconstitutionally vague, as now interpreted and applied by the Illinois Supreme Court, in violation of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the Illinois statute relating to injunctions, Ill. Rev. Stat. (1967), chapter 69, at section 12, relating to damages upon dissolution of an injunction, as now interpreted and applied in this case, deprives the defendants of equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, by relating defendants' entitlement to such damages to procedural luck and by depriving defendants of the right to seek damages under the statute where their legal rights are established for the first time only after review by the Illinois Supreme Court, instead of in the trial court.

4. Whether the Illinois statutes and court rules relating to assessment and taxation of costs, as applied and enforced, which fail to indemnify the successful defendants for all of their attorneys' fees, actual expenses and costs incurred or accrued in their successful defense of their substantive constitutional rights, are in violation of defendants' rights under the Ninth and Fourteenth Amendments of the Constitution of the United States, by denying and disparaging their substantive constitutional rights.

5. Whether the Illinois statutes and court rules relating to assessment and taxation of costs, which fail to indemnify the successful defendants for all of their attorneys' fees, actual expenses and costs incurred or accrued in the successful defense of their constitutional rights, substantially require defendants to purchase right and justice by law, in violation of the Illinois Constitution Article II, Section 2, and thus violate defendants' rights to due process of law and equal protection of law under the Fourteenth Amendment of the Constitution of the United States.

STATEMENT.

The House of Vision, Inc., a corporation engaged in selling spectacles, contact lenses and other optical products to the public, employed the defendant William M. Hiyane from 1959 to 1964, first as a lens grinder and later as a contact lens fitter. Early in 1964, Hiyane resigned and began working for Acro Contact Lens Service, Inc. at a location close by the plaintiff's Evanston, Illinois, office. The House of Vision, Inc. then brought the present action to enjoin Hiyane from competing with it within 30 miles of its Evanston office for an unlimited time, to enjoin Hiyane from working for Acro, and to enjoin Acro from employing him. The plaintiff sought both temporary and permanent injunctive relief, and damages (R. 15-19).

The suit was based upon Hiyane's employment contract, which contained the following covenant: "Upon the termination of his employment for any cause whatsoever, the Employee (Hiyane) shall not engage, directly or indirectly in the same or similar business as that of the Employer (The House of Vision, Inc.), anywhere within a radius of Thirty (30) miles from any office of the Employer in, or from which, the Employee rendered services at any time during his employment with the Employer." Hiyane rendered services for the plaintiff in Chicago, Evanston, Highland Park and Waukegan, Illinois. Highland Park is about 23 miles north of Chicago and Waukegan is about 35. An area within 30 miles radius of Chicago, Evanston, Highland Park and Waukegan, Illinois, contains over one-half of the population of the State of Illinois, and extends into Wisconsin on the north and Indiana to the south. In that area, there are substantial numbers of ophthalmologists and numerous important medical centers. Over 90% of plaintiff's customers were referred to it by ophthalmologists.

Upon plaintiff's motion for temporary injunctive relief, the case was referred to a master in chancery, who heard testimony and filed an interim report. Following the master's recommendations, the trial court entered an order (R. 30) holding the covenant against competition in Hiyane's employment contract to be unenforceable and void because it would be harsh and oppressive to the defendant, injurious to the public, and consequently unreasonable. The plaintiff's prayer for an injunction preventing Hiyane from engaging in a business similar to plaintiff's within thirty miles from plaintiff's Evanston office was denied, as was an injunction forbidding Acro to hire Hiyane. Pending a full hearing of the merits by the master, however, Hiyane was enjoined from soliciting patients or customers for whom he had done work while employed by the plaintiff (R. 30). The plaintiff appealed from this order (R. 32).

Upon the plaintiff's interlocutory appeal, the Illinois Appellate Court reversed and remanded, stating (A10):

> "The master found—and it was sustained by the court —that the covenant was void. This was apparently based upon the master's conclusion that, although the area restriction in the agreement was reasonable, the absence of a time limitation alone rendered the contract unreasonable and unenforceable. With this latter conclusion we do not agree. When there is no time limit specified in the contract it will not fall simply on that account, as a reasonable time will be inferred or imposed. It is our opinion, therefore, that the enforceability of the covenant by injunction is a matter for determination on a full hearing."

The mandate of the Illinois Appellate Court (R. 36) specifically stated:

> "The order of the Circuit Court of Cook County restraining William M. Hiyane from soliciting customers of plaintiff, is proper." . . .

On remand, the master heard further evidence on the merits of the complaint and recommended that Hiyane be enjoined from selling, dispensing, or fitting contact lenses or rendering service to wearers within *thirty* miles of plaintiff's Evanston office for a period of five years, and that Acro be enjoined from employing Hiyane in those capacities in the restricted area recommended by the master, for *five* years. The trial court entered such an injunction order (R. 40) for *five* years, but only within an area within *twenty* miles radius of plaintiff's Evanston office; and reserved the issue of plaintiff's damages for further hearings.

The defendants appealed directly (R. 52) to the Illinois Supreme Court from the permanent injunction order of the trial court, and the Illinois Supreme Court held (R. 56, 60, A19):

> "To stake out unrealistic boundaries in time and space, as the employer did in this case, is to impose upon an employee the risk of proceeding at his peril, or the burden of expensive litigation to ascertain the scope of his obligation. While we do not hold that a court of equity may never modify the restraints embodied in a contract of this type and enforce them as modified, the fairness of the restraint initially imposed is a relevant consideration to a court of equity. We conclude that the restrictions in the employment contract were not reasonably necessary for the protection of the plaintiff."

The Illinois Supreme Court further stated in this opinion (R. 61, A19, A20):

> "The decree of the circuit court assessed three-fourths of the master's fee against Hiyane. *In our opinion this and other costs should be borne by the plaintiff. The decree of the circuit court of Cook County is reversed, and the cause is remanded to that court with directions to dismiss the complaint for want of equity*

and to assess the fees of the master in chancery and other costs against the plaintiff." 37 Ill. 2d. 32, 225 N. E. 2d 21. (Emphasis supplied.)

In a timely manner, defendants thereafter moved the Illinois Supreme Court to retax appellate costs (R. 77) and attached an affidavit certifying appellate costs and expenses incurred in the appeal, including attorneys' fees and actual expenses in various amounts, for printing of briefs, supersedeas bond premiums and travel expenses, together with expenses of public secretarial services, special paper and "synthesis" in connection with the abstract of record, which were in addition to the $400.00 charge for actually reproducing the abstract (R. 81-83).

At the same time, in a timely manner, defendants asked the Illinois Supreme Court to amend its mandate by including a direction to tax costs in all phases of the proceedings, including attorneys' fees, and all costs related to the earlier interlocutory appeal by the plaintiff—which had resulted in the erroneous interlocutory ruling on the validity of the covenant that was now reversed by the Illinois Supreme Court (R. 75).

Both the motion to retax appellate costs and the motion to amend the mandate were denied (R. 91) without opinion by the Illinois Supreme Court, and the cause was remanded to the trial court.

After remand, in the trial court defendants filed suggestions of costs and damages pursuant to the provisions of the Illinois act pertaining to injunctions, Ill. Rev. Stat. (1967), chapter 69, section 12 (A38). Costs, including court reporter fees of $581.30 and items other than the $35.00 docket fee, $16.00 transcript cost and $400.00 for abstract, were alleged to be $1,288.27, minus a credit for the last three items totaling $451.00 received from the plaintiff. Damages suggested were: $1,705.16 (consisting

primarily of printing and secretarial services) plus attorneys' fees of $36,241.00 ($26,280.00 of which was alleged to relate to the appeal to the Illinois Supreme Court) and $30,000.00 for lost business (R. 64-69).

The defendants also orally moved the trial court to dissolve the temporary injunction against solicitation of plaintiff's customers, during the hearing on their suggestion of damages (which motion does not appear of record, but before the Illinois Supreme Court thereafter was conceded by plaintiff to have been made), which oral motion was expressly denied by orders of the trial court on 2 February, 1968 (R. 103, 105, A28, A29).

The trial court dismissed defendants' suggestion of damages by reason of the mandate of the Illinois Supreme Court which directed only that the trial court dismiss the complaint, for want of equity, and did not provide for further hearings of defendants' side of the case (R. 103, 105, A28, A29). The trial court also refused to hear any claims of the defendants as to damages as prayed for in their original answers to the plaintiff's complaint. These damage claims of defendants were never previously heard or determined in the trial court, or in either the Illinois Appellate Court or the Illinois Supreme Court, since those issues had been precluded from arising until after the Illinois Supreme Court invalidated the restrictive covenant and reversed the findings of all issues in favor of plaintiff, and also reversed the permanent injunction order against defendants.

The trial court assessed costs (limited to defendants' appearance fee of $11.00 and one witness' fee of $10.30) of $21.30 against plaintiff, and satisfaction therefor was given in open court (R. 110, A30). The trial court refused to assess against the plaintiff the costs traditionally recognized as taxable in the Illinois Appellate Court, which

the Illinois Appellate Court assessed against the defendany Hiyane in the amount of $219.67 as part of its ruling on plaintiff's interlocutory appeal which was later reversed by the Illinois Supreme Court; and also refused to assess against the plaintiff the cost of defendants' appearance fee ($15.00) in the Illinois Appellate Court which is a traditionally recognized cost in that court, and which was a cost of the defendants in the interlocutory appeal which was effectively reversed in their favor by the Illinois Supreme Court. Therefore, even in respect to assessment of traditionally recognized costs, the successful defendants ended up with a net deficit in the amount of $234.67.

The trial court on 2 February, 1968, entered two orders (one submitted by each side) (R. 103, 105, A28, A29) denying the defendants' motion to dissolve the temporary restraining order against solicitation by defendants and dismissing the complaint for want of equity, and dismissing the defendants suggestion of damages for want of jurisdiction pursuant to the mandate of the Illinois Supreme Court.

The defendants timely moved to retax costs (R. 114) and the motion was denied (R. 116, A31).

The defendants timely moved (R. 107) to vacate the two orders of 2 February, 1968, upon constitutional grounds with reference to the Illinois Constitution, Article II, sections 2 and 19, and with reference to the U. S. Constitution, Fourteenth Amendment. The trial court denied the motions, having considered the constitutional questions and ruled on them (R. 116, A31).

The defendants then filed a timely notice of appeal on constitutional grounds to the Illinois Supreme Court, praying *inter alia* for reversal of the orders dismissing the case and the suggestion of damages and costs, and further praying that the Circuit Court of Cook County be directed:

(1) to find the temporary injunction order against solicitation and also the permanent injunction order against defendants to be wrongful; (2) to hear the defendants' suggestion of damages pursuant to the Illinois act pertaining to injunctions (Ill. Rev. Stat. (1967), chapter 69, section 12), arising out of both the temporary and permanent injunction in the case; (3) to retax costs to include all court reporter fees paid by defendants and costs paid by defendants to plaintiff pursuant to the mandate of the Illinois Appellate Court in the interlocutory appeal; (4) to allow the defendants to raise all of the affirmative issues which they may properly raise under their pleadings or by amendment thereto, and grant the defendants a hearing on the merits and judgment on those issues; and, finally, (5) to dismiss the complaint for want of equity after all issues which may be raised by the defendants have been tried and determined (R. 118).

On this second appeal before it in this case, the Illinois Supreme Court affirmed the disposition given the case by the trial court, thereby finally preventing the defendants from having a hearing on their damage claims as pleaded and prayed for in their answers (R. 21, 26) to the complaint, and from having a hearing on their suggestion of damages pursuant to statute. The Illinois Supreme Court's action also prevented defendants from amending their pleadings to add claims for relief or counterclaims, under Illinois laws pertaining to civil practice, Ill. Rev. Stat. (1967), chapter 110, section 46 (1) et seq.

The appellants contended at every succeeding stage of the proceedings that the Illinois Supreme Court mandate directing that the complaint be dismissed for want of equity is repugnant to the Constitutions of the State of Illinois and of the United States. Appellants contended that, as applied and enforced, the Illinois Supreme Court's man-

date deprives defendants of due process and equal protection of law, by denying them the right to have a hearing on the merits of their claims of damage, as pleaded in their answers to the plaintiff's complaint; by denying them the right to have a hearing on the merits of their claims of damage pursuant to the Illinois act pertaining to injunctions; by denying them the right to have a timely ruling by the trial court that the temporary injunction against solicitation was wrongful and thus have a basis for claiming damages under the Illinois act pertaining to injunctions; and by denying them the right to amend their answers and to otherwise plead, including adding new claims against the plaintiff in the form of counterclaims, under Illinois laws pertaining to civil practice, Ill. Rev. Stat. (1967), chapter 110, section 46 (A41, A42).

These constitutional issues were raised in the trial court in the defendants' reply to the plaintiff's answer to defendants' Suggestion of Costs and Damages (R. 95) in which defendants challenged the power of the Illinois Supreme Court to deny by mandate the defendants' statutory right to damages before disposing of the case. The constitutional issues were more comprehensively raised in defendants' motion to the trial court (R. 107) to vacate the orders dismissing the case and to set a hearing on the defendants' suggestion of damages.

These constitutional questions were considered but rejected by the trial court (R. 116, A31).

In the second appeal to the Illinois Supreme Court on the issue of the dismissal of the complaint, the defendants contended that the Illinois Supreme Court, in ruling on the merits of the complaint on the earlier appeal, and in finding the complaint wanting in equity, did not preclude the defendants from proceeding thereafter on the issue of their own affirmatively pleaded damages, which issue became

ripe only on remand; and if defendants were actually thus precluded, their constitutionally protected right to due process of law in regard to their claims would be violated. The defendants also contended that, by refusing to dissolve the preliminary injunction order and to consider defendants' claims for damages, attorneys' fees and expenses, the trial court effectively prevented defendants from taking timely action to establish their right to damages under the Illinois act pertaining to injunctions, and from taking other timely action to prevent waiver of or loss of their claims and to preserve their rights to damages; and thus denied the defendants their constitutionally protected right to due process of law. The defendants also contended that a permanent injunction which is dissolved on appeal has the same character and effect on defendants as a wrongful preliminary injunction which is dissolved at the end of a trial of the merits; and that the Illinois act pertaining to injunctions provides a remedy upon dissolution of any injunction, so that the refusal of the trial court to consider the defendants' suggestion of damages pursuant to the Illinois act pertaining to injunctions was a denial of defendants' constitutionally protected right to due process of law under the Illinois act pertaining to injunctions (R. 160, 168 and 176).

The question of their attorneys' fees and expenses was raised by the defendants in their answers to the complaint (R. 21, 23; 26, 27) in which they demanded such attorneys' fees and expenses as were occasioned by the litigation. The question of attorneys' fees and expenses was also raised in respect to appellate litigation, by defendants' motions to amend the mandate (R. 75) and to retax costs (R. 77) in the Illinois Supreme Court, after that court decided the first appeal in favor of the defendants. The Illinois Supreme Court denied (R. 91) the procedural motions without comment at that time—but they were not then issues before

the court on appeal. Thereafter, the question of their attorneys' fees and expenses was again raised by defendants upon remand to the trial court with directions to "dismiss the complaint for want of equity". The issue of what was a taxable cost was argued to the trial court and then raised on appeal to the Illinois Supreme Court. On the second appeal to the Illinois Supreme Court, the defendants contended (R. 160, 168, 176) that in every lawsuit, the plaintiff seeks redress through due process of law; and when the defendant prevails in that litigation, his conduct has been adjudged to be rightful, legally harmless and constitutionally protected as between the parties. The defendants contended that in order to prevent constitutional due process from causing the erosion of all of the other constitutionally protected substantive rights of defendants, it is essential that due process of law, as provided by the constitution, include indemnification of all attorneys' fees and actual expenses reasonably incurred during the defense of his rights by the successful defendant. This argument was predicated upon the Ninth and Fourteenth Amendments to the Constitution of the United States, as well as upon the Constitution of Illinois, Article II, sections 2 and 19.

The Illinois Supreme Court specifically decided against appellants on all of the issues now presented to this Court on appeal, stating:

> (R. 171, A22) "Defendants argue that our mandate did not preclude them from proceeding on the issue of damages. . . . Defendants further argue that if they were precluded from a hearing on the issue of damages, which issue 'became ripe only on remand', there was a violation of due process. This argument is enlarged by the further assertion of due process violations; (1) by the court's refusal to dissolve the preliminary injunction order thereby preventing them from taking timely action under the Injunction Act and (2) that the dissolution of a permanent injunction

on appeal has the same effect as a wrongful preliminary injunction at the completion of a trial of the merits. . . ." (R. 173, A26). "Defendants next raise the issue, long settled by this court to the contrary (but now clothed in due process terms) that the eventual successful litigant should receive indemnification of all attorneys' fees and actual expenses reasonably incurred in enforcing his rights."

In rejecting the defendants' constitutional arguments, the Illinois Supreme Court applied its mandate to the defendants in a manner which absolutely prevented them from obtaining the equal protection of the Illinois act pertaining to injunctions, and prevented them from obtaining due process of law in respect to their claims for damages as pleaded and as provided by statute; which mandate was repugnant to the Fourteenth Amendment, as so applied and enforced. Furthermore, in rejecting defendants' contentions, the Illinois Supreme Court apparently refused to be specific or to discuss the specific constitutional issues raised by defendants in regard to their claims for attorneys' fees and actual expenses and costs, pursuant to the Ninth and Fourteenth Amendments. Instead, the Illinois Supreme Court disposed of this issue by a vague and inaccurate description (R. 173, 174, A26) of defendants' actual arguments to that court and did so without any reference at all to the Ninth Amendment as related to the Fourteenth Amendment of the Constitution of the United States, which the defendants had argued fully and specifically (R. 160, 168, 176) to the Illinois Supreme Court.

In a Petition for Rehearing (R. 176), defendants argued that the Illinois Supreme Court had applied and enforced to the defendants' disadvantage the Illinois act pertaining to injunctions in a manner which was, if so applied and enforced, repugnant to the Fourteenth Amendment. Defendants further argued that the Illinois Supreme Court

had summarily rejected defendants' constitutional arguments without real explanation, both in respect to the Illinois act pertaining to injunctions and in respect to the defendants' claim of entitlement to attorneys' fees and expenses under the Ninth and Fourteenth Amendments, and thus disparaged the defendants' constitutional rights to due process on appeal. The Illinois Supreme Court denied the petition for rehearing, without opinion (R. 177).

THE QUESTIONS ARE SUBSTANTIAL.

The specifics of the original controversy are not basic to the issues before this Court on appeal. The constitutional issues arise out of various procedural determinations by the Illinois Supreme Court, affirming the action of the trial court, which result in the violation of appellants' constitutional rights. Insofar as the substantial nature of all of the questions before the Court are concerned, the following undisputed facts are believed to be sufficient to supply the factual background of the issues:

This case originally arose out of a complaint for injunctive relief and damages against both defendants, pursuant to a covenant against post-employment competition by plaintiff's former employee, defendant Hiyane, and his employment by plaintiff's competitor, defendant Acro. The restrictive covenant was applicable within thirty (30) miles radius from any offices of the plaintiff in which defendant Hiyane had worked, and was unlimited in time.

Immediately after the filing of the complaint, plaintiff moved for various forms of temporary injunctive relief. This matter was referred to a master for hearing and recommendations. Upon the interim report of the master, the trial judge entered a temporary injunction order against solicitation of plaintiff's customers, pending a hearing on the merits; but the trial judge also ruled that

the restrictive covenant was *void* because it was unlimited in time. The plaintiff immediately appealed to the Illinois Appellate Court in respect to the failure to grant further temporary injunctive relief and also in respect to the ruling that the covenant was void.

The Illinois Appellate Court *affirmed the temporary injunction order against solicitation*, but *reversed* the trial judge in respect to his ruling that the restrictive covenant was void. *It directed the trial judge to make the restrictive covenant valid by writing into the restrictive covenant a "reasonable" time limitation sufficient to meet the needs of the plaintiff, and further directed the trial court to hear the merits of the plaintiff's complaint.*

At this point, it is essential to refer to the Illinois Supreme Court's Opinion appealed from (R. 171, A22, A23) which declares that upon remand from the Illinois Appellate Court, the trial court had no choice but to comply with the mandate of the Illinois Appellate Court. A motion by defendants to dissolve the temporary injunction against solicitation would have been at the least frivolous, and perhaps contemptuous of the mandate of the Illinois Appellate Court. To make such a motion would have been a useless and ineffective procedural or substantive act. Yet, even though the Illinois Supreme Court now says that a reviewing court's mandate must be obeyed literally, the same Court also simultaneously holds that in order to recover damages for a wrongful temporary injunction, it was at this point in time and procedure in this case that the defendants were required *to move for* and *obtain dissolution of* the temporary injunction against solicitation!

Thereafter, a hearing was held on the merits, and the trial court, acting upon the report of the master, entered a permanent injunction order against both defendants against all types of competition with plaintiff through

defendant Hiyane's services but reduced the restrictions of the covenant to *within a radius of twenty (20) miles* of plaintiff's Evanston office for a period of *five (5) years.* The trial court found all issues in favor of plaintiff, *and reserved the question of plaintiff's damages for further hearings before the master.* The defendants then appealed from the permanent injunction order to the Illinois Supreme Court.

It is essential to note that at this time the trial court had made a determination only of the issue of liability; but this finding of liability was, of course, inevitable by reason of the mandate of the Illinois Appellate Court, which ordered that the restrictive covenant should be reconstructed to be made valid.

The Illinois Supreme Court thereafter *reversed* the permanent injunction order of the trial court and the ruling in favor of the plaintiff on the issue of liability. It directed that the case be remanded to the trial court *with directions to dismiss the complaint for want of equity* and to assess the fees of the master and other costs against the plaintiff. At this point, the mandate of the Illinois Appellate Court was effectively overruled and nullified *for the first time.*

Upon remand, in the trial court the defendants filed a suggestion of damages pursuant to the Illinois statute pertaining to injunctions, and also pursuant to the damages claimed in their original answers to the complaint. The trial judge refused to hear these claims and refused to dissolve the original temporary injunction order prior to dismissing the complaint, on the basis that the Illinois Supreme Court's mandate deprived him of all jurisdiction except to dismiss the complaint and to assess the master's fees and other costs against the plaintiff. The trial court dismissed the complaint. The defendants then appealed for a second time, on constitutional grounds, to the Illinois

Supreme Court. The Illinois Supreme Court affirmed dismissal of the complaint and affirmed the rulings of the trial judge which denied defendants the opportunity to seek any remedies or relief upon remand from the earlier appeal.

QUESTIONS CONCERNING THE ILLINOIS STATUTE PERTAINING TO INJUNCTIONS

1. One of the substantial questions arising out of the action of the trial court in refusing to hear damages claims of the defendants under the Illinois statute pertaining to injunctions Ill. Rev. Stat. (1967), chapter 69, is whether the Illinois Supreme Court has by its mandate, as interpreted and enforced in the second appeal, rendered the injunction act unconstitutionally vague.

In its Opinion (R. 173, A25), the Illinois Supreme Court holds that there are *three different points* in a case before which a temporary injunction must be dissolved if the defendant is to be entitled to recover damages under section 12 of the injunction statute. In its Opinion, the Illinois Supreme Court said (R. 173, A25):

> "In order that damages may be recovered, a temporary injunction must be dissolved *before final judgment on the merits.*" (Emphasis supplied.)

Immediately thereafter in its Opinion, the Illinois Supreme Court said (R. 173, A25):

> "If the temporary injunction is not dissolved *before the hearing on the merits*, if it is merged into the permanent injunction when plaintiff prevails, *or* if it becomes functus officio by reason of the complaint being dismissed *there has been no legal determination that it was wrongfully issued* and there can be no assessment of damages by this (statutory) summary procedure." (Emphasis supplied.)

Immediately thereafter in its Opinion, the Illinois Supreme Court said (R. 173, A25, A26):

> "Here, no motion was ever made by defendants to dissolve the temporary injunction *until after a holding on the merits.* The motion on the hearing on the suggestion of damages (not appearing of record but conceded by plaintiff to have been made) came too late." (Emphasis supplied.)

Then the Illinois Supreme Court said (R. 173, A26):

> "*Our procedure under the statute gave defendants ample opportunity to seek dissolution* of the temporary injunction *in apt time* thereby giving them an opportunity to be heard on the question of damages suffered in securing dissolution." (Emphasis supplied.)

The substantial question which defendants believe is thus presented is whether the Illinois statute pertaining to injunctions, and specifically to damages upon dissolution of injunctions, is unconstitutionally vague, in that the Illinois Supreme Court has in a single, final Opinion in this case stated that there are *three, distinctly different procedural* points in a case, *before one of which* a temporary injunction *must be dissolved* in order for the defendants to be in apt time to be entitled to be heard on the question of damages suffered in securing dissolution. The Illinois Supreme Court is ambiguous as to which point is the proper point in time before which the defendants must act. If it is the earliest procedural time mentioned, i.e., before a hearing on the merits, the other procedural points referred to are meaningless since they are too late in time. If it is the latest point in time mentioned, i.e., before final judgment on the merits, the references to the other points in time procedurally earlier in the case are confusing. Lastly, if it is simply before final judgment on the merits, there is further ambiguity in the statute because the "final" judgment in the trial court as seen

by the Illinois Supreme Court in this case was only on the issue of liability.

An additional ambiguity appears to exist in the Illinois statute pertaining to injunctions (according to the Opinion, above,) since the Illinois Supreme Court said that if a temporary injunction *merges* into a permanent injunction, no damages can be assessed for the wrongfulness of the temporary injunction without regard to the erroneous nature of the permanent injunction itself. Merger alone, however erroneous or improper, deprives defendants of the statutory benefits forever. The Illinois Supreme Court is explicit on this point, since it declares unambiguously that where the permanent injunction is nullified by a reviewing court which makes the temporary injunction functus officio by dismissing the plaintiff's complaint, the statutory benefits are still lost forever (A25).

Defendants submit that the Illinois statute on injunctions has been made unconstitutionally vague in that its force and effect are controlled by the interlocutory rulings of the trial court whether erroneous or correct, and not by the final disposition of all of the merits of all claims of the litigants after all appeals are concluded.

2. A subsidiary substantial question which arises concerning the Illinois statute relating to injunctions is whether the Illinois Supreme Court correctly construed the Illinois statute relating to injunctions at all, insofar as it declared that a temporary injunction must be dissolved either before a "hearing on the merits", or before a "holding on the merits", or before "final" judgment on the merits", in order for statutory damages to be claimed. The statute itself, at section 12 (A38) merely sets a general limitation: "*In all cases where an injunction is dissolved* by any court of chancery in this state, *the court, after dissolving such injunction*, and before finally disposing of the suit, . . . *shall hear evidence and assess such damages* . . ."

In respect to the Illinois statute pertaining to injunctions, it would appear that the Illinois Supreme Court has interposed language that is not in the statute, by requiring that a defendant prove that an injunction was *wrongful*, and make that proof prior to certain procedural points in the case, without regard to any later review of the facts and law by the trial judge or appellate court which establishes that wrongfulness *nunc pro tunc*, such as in this suit in which the reviewing court has ruled that the complaint itself should be dismissed for want of equity. The Illinois Supreme Court apparently holds that although the plaintiff's case never had any merit on its face from its inception, it had merit insofar as the defendants may want to assert any claim that they were injured by injunctive relief granted by the trial court pending a hearing on the merits of the unmeritorious complaint. The Illinois Supreme Court also seems to hold that defendants could not possibly be entitled to damages where a temporary injunction merged with a permanent injunction granted by a trial court after the hearing of the merits of an unmeritorious complaint, because the statute contemplates damages *only* where the injunction is *wrongful*, and dismissal of a complaint for want of equity apparently cannot possibly give rise to the inference that a temporary injunction was wrongful *per se* or *per quod ab initio*.

Defendants submit that the requirement that they establish the "wrongfulness" of an injunction at the same time as they obtain its dissolution places an unconstitutional burden on them, in that they are required thus to obtain final appellate rulings at every stage in a case prior to "holdings on the merits", "hearings on the merits", and "final judgments on the merits" in order to establish "wrongfulness" in a timely manner to apply for dissolution in apt time. Such a requirement creates unequal protection of the law, because it deprives defendants of substantive

statutory relief if they are subjected to erroneous procedural rulings by a trial judge or by a reviewing court in an interlocutory appeal, even though those rulings are corrected after a hearing on the merits, or after a final appeal. Such a requirement also creates unequal protection of the law because the right to seek an interlocutory appeal in Illinois is strictly limited to specific kinds of trial court actions, and is not necessarily available in most instances *prior to* "holdings on the merits", "hearings on the merits", or "final judgments on the merits"; so that in most cases judicial error in the trial court cannot be corrected in a timely manner by defendants so as to preserve their statutory rights.

Defendants also contend that the Illinois Supreme Court's interpretation of the Illinois injunction act also denies them equal protection of law because it equates final and appealable judgments with final and non-appealable judgments in Illinois, since it gives a final judgment which is appealable the same finality as a final judgment which has become unappealable, even though an appeal is actually taken and results in a reversal.

3. Another substantial question concerning the Illinois statute pertaining to injunctions which defendants believe is presented is the unconstitutional vagueness and ambiguity of the statute as interpreted and enforced in this case by the Illinois Supreme Court, with respect to the term "injunctions" as it appears in the statute.

Section 12 of the statute (Ill. Rev. Stat. 1957, Ch. 69, par. 12) refers to claims for damages by defendants: "In all cases where *an injunction* is dissolved by any court of chancery . . ." The Illinois Supreme Court now holds that the term "an injunction", as it appears in Section 12, means only "*a temporary* injunction", and was not meant to include "*permanent* injunctions".

Defendants submit that a substantial question thus arises because there is no place in the entire Illinois statute pertaining to injunctions, Ill. Rev. Stat. (1967), chapter 69 (A33-A40), in which the term "permanent injunction" appears at all! Section 1 of the statute declares that the circuit courts of Illinois shall have the power to grant "writs of injunction". Except where the statute specifically refers to "preliminary injunctions" and "temporary restraining orders" (Sections 3, 3.1), the term "injunction" appears unmodified by any adjective in the statute. In discussing the interpretation to be given to the term "injunction" throughout the statute, with the exception of section 1, the Illinois Supreme Court has now held that the term "injunction" means only "*temporary* injunction". If the term "injunction" in Section 1 is to be defined uniformly with the rest of the statute, it appears that section 1 must be construed to give to the circuit courts the power only to grant writs of "*temporary* injunction". This, of course, is in direct conflict with other parts of the Illinois Supreme Court's same Opinion, which clearly holds that there is the legal remedy of "permanent injunction" in Illinois, which is distinctly different in nature from a "*temporary* injunction".

If, therefore, appears that while the circuit courts of Illinois have statutory power to grant only *temporary* injunctive relief, and to award damages for *statutory* injunctions wrongfully issued or dissolved within rigid procedural limits, they are also exercising a power *outside* of the statute, which is undefined, unlimited and uncertain in nature, when they grant writs of "*permanent* injunction". The constitutional questions become more complex when, as in this case, the "permanent injunctions" which were entered by the trial court were later reversed by the Illinois Supreme Court. Did such "permanent injunctions" thereby take on the characteristics of "temporary injunctions"

which were governed by the remedies fashioned by the Illinois Legislature for "temporary injunctions" which are dissolved "before finally disposing of the suit"? What is the full nature of this non-statutory "permanent injunction", which the Illinois Supreme Court seems to hold is unknown, unrecognized and unregulated by the Illinois Legislature, and yet has a life of its own? Did the Illinois Legislature intend that its statutory "temporary injunction" should "merge" with this non-statutory "permanent injunction", to disappear in a cloud of "functus officio" until reversal of the "permanent injunction" order at a later time? Did the Illinois Legislature intend its statutory creation to be endowed with the characteristics of a Cheshire Cat able to reappear with a huge grin when the erroneous "permanent injunction" with which it merged is voided? If so, it must still be the orginal creature which the statute created and it still remains to be dissolved, its grin to be erased forevermore! Yet, in this case, the trial court refused to dissolve it and the Illinois Supreme Court affirmed! If the trial court was thus bound to dismiss the complaint for want of equity but was within its discretionary powers in allowing the temporary injunction order to stand undissolved, the defendants were able to be denied statutory remedies simply upon the arbitrary action of the trial judge; without regard to the merits of their case. Defendants submit that the constitutional issues here cry out their substantial nature.

QUESTIONS CONCERNING THE EFFECT OF A MANDATE OF A REVIEWING COURT UPON THE PARTIES TO THE APPEAL AND UPON THE COURT TO WHICH THE CAUSE IS REMANDED.

In the Illinois Supreme Court, in the Opinion now appealed from, the Court says (R. 171, A22, A23):

> "Where, as here, the directions of a reviewing court are specific, a positive duty devolves upon the court to which the cause is remanded to enter an order or decree in accordance with the mandate. Precise and unambiguous directions in a mandate must be obeyed."

A substantial question which the defendants believe is here presented is whether, under the principles expressed in the Opinion of the Illinois Supreme Court in the case now appealed, there was any real opportunity or any theoretical opportunity, for that matter, to seek dissolution of the temporary injunction against solicitation.

In the very beginning of this case in the trial court, upon the recommendations of the master in chancery in regard to the issue of a temporary injunction, the trial court had to make a ruling of law which went to the merits of the complaint, which was based on the restrictive covenant in defendant Hyane's employment contract. The validity of the covenant was a necessary issue in regard to the kind and extent of injunctive relief to be granted. The trial judge ruled that the covenant was void. This ruling was sustained eventually by the Illinois Supreme Court; but was reversed in the interim by the Illinois Appellate Court in an interlocutory appeal before a hearing on the merits. The Illinois Appellate Court *issued a mandate* to the trial court directing that the covenant be made reasonable and enforceable.

The Illinois Supreme Court now holds that where the directions in the mandate of the Illinois Appellate Court

were specific, a positive duty devolved upon the trial court in this case to enter orders or decrees in accordance with the mandate. In its mandate, the Illinois Appellate Court directed that the trial court validate the restrictive covenant by reducing it to a reasonable time limit. In its mandate, the Illinois Appellate Court also affirmed the temporary injunction against solicitation. According to the Illinois Supreme Court, therefore, the trial court could neither make a ruling on the merits that the restrictive covenant was invalid nor dissolve the temporary injunction on the basis that it was wrongful.

The Illinois Supreme Court did not suggest that the defendants should have attempted to seek leave to appeal directly to the Illinois Supreme Court from the Illinois Appellate Court after the above interlocutory disposition by the Illinois Appellate Court, nor did it indicate that the defendants would have had a basis for such an appeal at that time. Furthermore, Illinois Supreme Court Rule 318(b) provides (A.5) that a failure to seek review when the Appellate Court's disposition of the case is not final does not constitute a waiver of the right to present any issue in the appropriate court thereafter. Notwithstanding this, the Illinois Supreme Court holds that it was at that point in time, in the face of the mandate of the Illinois Appellate Court, that the defendants were obliged to *seek* and *obtain* dissolution of the temporary injunction if they were to be entitled to statutory damages arising out of the temporary injunction!

Even if the point in time before which the injunction had to be dissolved was the time when there was a "holding on the merits", there could have been no different result, since the mandate of the Illinois Appellate Court pertained to the validity of the contract on which the plaintiff's suit was predicated and was a "holding on the merits" itself. The

same is true about a motion to dissolve the injunction before a "final judgment on the merits".

After the "permanent injunction order" was entered in the trial court *pursuant to the mandate* of the Illinois Appellate Court, a second interlocutory appeal was taken this time to the Illinois Supreme Court. The Illinois Supreme Court does not make clear whether it regards the "permanent injunction order" as "final judgment on the merits"; although presumably it was a final judgment on the merits in respect to injunctive relief. The issue of plaintiff's damages was reserved by the trial court, so less than all of the issues of the case were disposed of by the "permanent injunction order". On this second appeal, the Illinois Supreme Court effectively *reversed the mandate and Opinion of the Illinois Appellate Court* on the merits of the complaint and on the validity of the restrictive covenant. Nothing was said about the rightfulness or wrongfulness of the temporary injunction which had "merged" into the permanent injunctions which were dissolved.

The Illinois Supreme Court now seems to hold that there was some way that defendants could have overcome the mandate of the Illinois Appellate Court, by hindsight *nunc pro tunc*. It holds that defendants cannot ask the trial court now, in the light of the reversal of the Illinois Appellate Court ruling on the validity of the restrictive covenant and in the light of the finding that the complaint always lacked equity on its face, to rule that the temporary injunction order was wrongful. It seems overwhelmingly clear that because of the compulsion of the erroneous mandate of the Illinois Appellate Court and of the arbitrary mandate of the Illinois Supreme Court (to dismiss the complaint for want of equity), the defendants have no procedural way to establish in timely fashion the elements of their statutory claim to damages.

It thus appears that by means of arbitrary or accidental procedural events during a trial, the defendants in Illinois can be forever barred from claiming statutory remedies which would have been theirs if the trial court or interlocutory appellate court had not committed error. It also appears that even if appellants succeed on the merits of their appeal in Illinois, they can lose all by an unfortunate choice of language in a mandate, which is specific and unambiguous but limited in scope.

The importance and recurring nature of this problem is exemplified by the recently reported case of *United Travel Service, Inc.* v. *Weber*, __ Ill. App. 2d __, 247 N. E. 2d 801 (1969), in which a covenant against post-employment competition by a former employee was first upheld by the trial court and injunctive relief granted. On appeal the injunction was reversed and a mandate issued to dismiss the complaint for want of equity (based upon the decision of the Illinois Supreme Court in this case). This new decision is copying the errors of the Illinois Supreme Court. It is obvious that the decision is hardening the practice in this area.

A further serious problem which is created by the effect of such mandates in Illinois is the unappealable nature of an inadequate or arbitrary mandate. It appears that where a mandate of a reviewing court is specific and unambiguous, the trial court cannot exercise any further jurisdiction beyond that expressed in the mandate. It is apparently imperative now for appellants and appellees to submit careful arguments about the exact language of any mandate which may issue from the reviewing court, even before they know what the reviewing court will decide, because it will be difficult to seek amendment of a mandate thereafter, even where the successful party may discover he has additional rights which appear from the reviewing court's

opinion and ripen only after remand, while the trial court is exercising limited jurisdiction under the mandate.

Defendants-appellants submit that substantial constitutional questions are involved here.

QUESTIONS CONCERNING THE RIGHTS OF THE SUCCESSFUL DEFENDANTS TO INDEMNIFICATION OF THEIR ATTORNEYS' FEES, ACTUAL EXPENSES AND COSTS, AS A MATTER OF CONSTITUTIONAL RIGHT, RATHER THAN LEGISLATIVE OR JUDICIAL DISCRETION.

Defendants contend that a matter of the most far-reaching substance and importance is the *constitutional* question raised by them, and argued at length in the Illinois Supreme Court, in respect to their entitlement to all of their attorneys' fees, actual expenses and costs incurred during all of the trial court proceedings and all appellate proceedings.

Defendants submit that in every lawsuit, the plaintiff seeks redress through due process of law. When the *defendant* prevails in such litigation, *his conduct* has been *adjudged* to be *rightful, legally harmless* and *constitutionally protected, as between the parties.* In order to prevent constitutional due process itself from causing the *erosion* of all of the other constitutionally protected *substantive* rights of defendants, it is essential that due process of law, as provided by the Constitution of the United States, include indemnification of all attorneys' fees, actual expenses and costs reasonably incurred during the defense of his rights by the successful defendant.

Defendants-appellants rely upon the Ninth Amendment to the Constitution of the United States, which, as construed in *Griswold* v. *Connecticut*, 381 U. S. 479, declares that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. James Madison in Federalist No. 10 (Modern Library ed. 1937) at p. 55, said:

"There are again two methods of removing the causes of faction: The one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

"It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

"The second expedient is as impracticable as the first would be unwise . . . The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. *The protection of these faculties is the first object of government.* From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues the division of the society into different interests and parties." (Emphasis supplied.)

The so-called American Rule, that attorneys' fees and expenses are not awarded in absence of statute or rule, is a departure from the so-called English Rule (which is also the rule on the European continent), which indemnifies the successful litigant for attorneys' fees, etc. The English and Continental experience does not indicate that any evil results from the assessment of attorneys' fees, etc. against the losing party. According to *United Mine Workers v. Illinois State Bar Assn.*, 389 U. S. 217, the American Rule, which is based solely upon legislative and judicial discretion (and so affirmed as a matter of discretion in this case by the Illinois Supreme Court) cannot be sustained

merely because it has been upheld for the purpose of dealing with the *theoretical* possibility of harm, where the English and European experience has shown no actual harm. Since the American Rule adversely affects the exercise of vital constitutional rights as applied and enforced, it should fall.

The American Rule has been defended by this Court as a matter of discretion, primarily on the basis that if the Rule were not in effect, a poor man might feel constrained against suing a wealthier man, or even a man of his own economic level, because of the possibility of losing and thereby being obligated to indemnify the successful defendant for his attorneys' fees and expenses. This Rule ignores the corollaries of its own premises. (1) A poor man will be equally restrained from filing suit against even the richest defendant even when he is absolutely certain of winning, if the amount of his claim is small and he is obliged to pay his own attorneys' fees and substantially all of his expenses out of the amount recovered. (2) A poor man who is absolutely certain of his right to prevail in a suit against a rich man may be effectively deprived of his rights if the rich man can extend and complicate the litigation by expensive discovery procedures, numerous pretrial motions requiring extensive legal preparation by plaintiff's lawyer, and by resort to interlocutory appeals and post trial appeals whenever possible, and by general refusal to settle the plaintiff's claim without a trial if there is even the slightest basis for disputing that claim, where the poor plaintiff cannot afford the now unrecoverable expenses of opposing such tactics. (3) A poor man who may not recover all of his attorneys' fees and reasonable expenses when he prevails in a suit is forced into a position of *inequality* with the adverse party *at the beginning* and *during the course of litigation* simply on the basis of his inadequate financial resources and without regard to his

versy, and the necessity of the temporary injunction should be made apparent by appropriate allegations showing that a change in the status would cause irreparable injury: [Citing cases.]"

The court further stated:

"... matters should be preserved in their present state and status quo until the cause can be disposed of on its merits; one important consideration upon an application for a temporary injunction is the relative inconvenience to be caused the respective parties if the application be allowed or denied: [cases cited.]"

In *Centennial Laundry Co.* v. *West Side Organization,* ..... Ill. App. 2d (No. 50122), 204 N. E. 2d 589, the court said:

"Plaintiff was required to establish, as a prerequisite to obtaining the temporary injunction, the probability of ultimate success on the merits of the case, *Lipkin* v. *Burnstine,* 18 Ill. App. 2d 509, 152 N. E. 2d 745, as well as the immediate necessity of an injunction to preserve the *status quo* and prevent irreparable harm of its rights ..."

In 21 I. L. P. Injunctions § 12, it is stated that "the merits of the main controversy are not necessarily involved in the question whether a temporary injunction should be ordered where the effect of such an injunction is merely to hold property in status quo until the rights of the parties have been adjudicated." An interlocutory injunction becomes *functus officio* when the case is disposed of on its merits. *Schuler* v. *Wolf,* 372 Ill. 386, 24 N. E. 2d 162. In *Klein's Restaurant Corp.* v. *McLain,* 293 Ill. App. 54, 11 N. E. 2d 644, the court cited and quoted from *People* v. *Standidge,* 333 Ill. 361, 164 N. E. 844, in which it was stated: "An interlocutory injunction is merely provisional in its

nature and does not conclude a right." In that case it was further held that such injunction stands as a binding restraint until rescinded by the further action of the court. Its object is to preserve the subject in controversy, but it is not decisive of the cause upon the merits. In the *Klein* case the court said:

> "From this rule announced by the Supreme Court it is clear that an interlocutory injunction is merely provisional in its nature and does not conclude a right. The order of the court, although in form declares the order is a temporary one, in effect disposes of the merits of the controversy between the parties."

In the instant case the plaintiff urged that the decree of the trial court should be reversed in toto. Here the court was dealing with a restrictive covenant in an employment contract. Such contracts would not be enforced unless

1) Such restrictions are reasonably related to safeguarding the employer without putting unreasonable restraints upon trade [*Beltone Electronics* v. *Smith*, 44 Ill. App. 2d 112, 194 N. E. 2d 21; *Northwest Side Lumber Co.* v. *Layton*, 239 Ill. App. 82; *World Wide Pharmacal Dist. Co.* v. *Kolkey*, 5 Ill. App. 2d 201, 125 N. E. 2d 309; *Bardwick Agency, Inc.* v. *Hale*, 29 Ill. App. 2d 149, 172 N. E. 2d 638; *Snyder* v. *Hamilton*, 39 Ill. App. 2d 352, 189 N. E. 97];
2) Such restrictions are not unduly harsh and oppressive on the employee [*American Cleaners & Dyers* v. *Foreman*, 252 Ill. App. 122; *In re Solar Textiles Co.* v. *Fortino*, 46 Ill. App. 2d 436, 196 N. E. 2d 719; *Brunner & Lay, Inc.* v. *Chapin*, 29 Ill. App. 2d 161, 172 N. E. 2d 652]; and
3) The effect is not injurious to the public [*Tarr* v. *Stearman*, 264 Ill. 110, 105 N. E. 957; *Hicklin* v. *O'Brien*, 11 Ill. App. 2d 541, 138 N. E. 2d 47]. [Sec. 313-315 Restatement of Contracts.]

The master found—and it was sustained by the court—that the covenant was void. This was apparently based upon the master's conclusion that, although the area restriction in the agreement was reasonable, the absence of a time limitation alone rendered the contract unreasonable and unenforceable. With this latter conclusion we do not agree. When there is no time limit specified in the contract it will not fall simply on that account, as a reasonable time will be inferred or imposed. It is our opinion, therefore, that the enforceability of the covenant by injunction is a matter for determination on a full hearing. The case is argued in this court as though this was an appeal from a permanent injunction, which is not the case. That question is still open for further hearing.

In *McCook Window Co.* v. *Hardwood Door Corporation*, 52 Ill. App. 2d 278, 202 N. E. 2d 36, the court, in dealing with a contract depends on the reasonableness of the restraint as to time and the extent of the territory, and while neither one is conclusive, both are important factors, and furthermore, that the restraint must be reasonable as to the general public. In that case the court held that the contract was unreasonable and further said that there was "no showing that if defendants resumed the wholesale manufacturing of exterior window frames at any time while plaintiff is engaged in the same business in the same area plaintiff would suffer more than if a stranger began to compete."

In the case before us, records were introduced in evidence showing a decrease in the business of the plaintiff after Hiyane was employed by Acro, but there was no showing that the decrease was due to the activities of Hiyane. The recommendation of the master that a tem-

porary injunction should issue against Hiyane preventing him from soliciting customers of the plaintiff was proper and the court could have issued such injunction without relying on any contract between Hiyane and the plaintiff.

In a recent case decided by the Appellate Division of the Supreme Court of New York, *Audiographic of N. Y. Corp.* v. *Thermionic Corp. of Am.*, 198 N. Y. S. 2d 508 (1960), a motion was made for a temporary injunction to restrain the defendants from engaging in a business similar to that of the plaintiff. The case was decided on the pleadings without a hearing. The pleadings showed that the individual defendants named in the case had been employed by the plaintiff as sales representatives and that each of them had signed an agreement containing a restrictive covenant and that they were now employed by the corporate defendant. It was not shown that the plaintiff had lost any business as a result of the change in employment, nor was it shown that any customer had been solicited. In that case the court held that if "the broad injunction sought" had been granted in accordance with the restrictive covenant, it would prevent the defendants from "engaging in a line of business, the same or similar to that engaged in by plaintiff, within a radius of thirty miles from any of the plaintiff's offices or within such area in which plaintiff sells and distributes fire and burglar warning systems, being specifically the Counties of Nassau, Suffolk, Queens and Kings.' It is contrary to public policy to unreasonably restrict 'the liberty of a man to earn his living.'" The court, however, did enter an injunction restraining the defendant, pending trial, from soliciting old customers or prospective customers referred to the plain-

tiff during the period when the individual defendants were employed by plaintiff, and pointed out that the purpose of a temporary injunction is only "to hold the matter in *statu quo* until opportunity is afforded to decide upon the merits."

The court properly entered an order restraining Hiyane from soliciting customers of plaintiff. The statement in the order that on a full hearing article 6 of the contract should be considered unenforceable and void was improper and the case is reversed and remanded to the trial court with instructions to delete that portion of its order and to set the case for a full hearing.

Reversed and Remanded.

ENGLISH, *J.*, and DRUCKER, *J.*, concur.

II. Opinion of Illinois Supreme Court, 37 Ill. 2d 32 (1967).

Mr. JUSTICE SCHAEFFER delivered the opinion of the court:

This is an action to enforce an employee's covenant not to compete with his employer. The plaintiff, The House of Vision, a corporation engaged in selling spectacles, contact lenses and other optical products, employed the defendant, William M. Hiyane, from 1959 to 1964, first as a contact lens grinder and later as a contact lens fitter. Early in 1964 Hiyane resigned and began working for co-defendant Acro Contact Lens Service, Inc., at a location 150 feet from plaintiff's Evanston office. The plaintiff brought the present action to enjoin Hiyane from working for Acro and to enjoin Acro from employing him.

The action is based upon Hiyane's employment contract, by which House of Vision promised to employ Hiyane for one year at a specified rate, and Hiyane promised: "6. Upon the termination of his employment for any cause whatsoever, the Employee shall not engage, directly or indirectly, in the same or similar business as that of the Employer, anywhere within a radius of Thirty (30) miles from any office of the Employer in, or from which, the Employee rendered services at any time during his employment with the Employer." Hiyane rendered services for the plaintiff in Chicago, Evanston, Highland Park and Waukegan. Highland Park is about 23 miles noth of Chicago and Waukegan is about 35.

The case was referred to a master who heard testimony and filed an interim report. Following the master's recommendations, the court entered an order holding the sixth paragraph of the employment contract unenforceable and

void because it would be harsh and oppressive to the defendant, injurious to the public and consequently unreasonable. The plaintiff's prayer for an injunction preventing Hiyane from engaging in a business similar to the plaintiff's within thirty miles of plaintiff's Evanston office was denied, as was an injunction forbidding Acro to hire Hiyane. Pending a full hearing by the master, however, Hiyane was enjoined from soliciting patients or customers for whom he had done work while employed by the plaintiff.

Upon the plaintiff's interlocutory appeal, the appellate court reversed and remanded, stating "The master found—and it was sustained by the court—that the covenant was void. This was apparently based upon the master's conclusion that, although the area restriction in the agreement was reasonable, the absence of a time limitation alone rendered the contract unreasonable and unenforceable. With this latter conclusion we do not agree. When there is no time limit specified in the contract it will not fall simply on that account, as a reasonable time will be inferred or imposed. It is our opinion, therefore, that the enforceability of the covenant by injunction is a matter for determination on a full hearing." *House of Vision* v. *Hiyane*, 58 Ill. App. 2d 431, 440-41.

On remand the master heard further evidence and recommended that Hiyane be enjoined from selling, dispensing, or fitting contact lenses or rendering service to wearers within twenty miles of plaintiff's Evanston office for a period of five years, and that Acro be enjoined from employing Hiyane in those capacities in the restricted area recommended by the master, for five years. The trial court entered such an injunction, and allocated the master's fees, in the sum of $3,043.25, one fourth to the plaintiff and three fourths to Hiyane.

On this direct appeal the defendants first argue that the trial court had no authority to refer the case to a master in chancery since fee officers, including masters in chancery, were abolished by section 8 of the new article VI of the Illinois constitution, which became effective before this action was commenced. They also contend that the trial court unconstitutionally impaired the obligation of the contract between the parties when it substituted its own restriction on competition for that agreed to by the parties. And apart from constitutional contentions they urge that the record in this case does not support any restriction on competition.

We do not agree with the defendants that section 8 of article VI of the constitution forbade reference of the present case to a master in chancery. The provision of that section that there "shall be no masters in chancery or other fee officers in the judicial system" must be read in conjunction with paragraph 8 of the Schedule accompanying the new article VI, which states: "Notwithstanding the provisions of Section 8 of this Article, masters in chancery and referees in office in any court on the Effective Date of this Article shall be continued as masters in chancery or referees, respectively, until the expiration of their terms, and may thereafter by order of court, wherever justice requires, conclude matters in which testimony has been received." The controversy in the present case turns on the word "thereafter." It refers either to the effective date of the Judicial Article, January 1, 1964, or to the expiration date of the term of office of the master. Under the first reading, the reference in the present case was prohibited; under the second it was permitted. Our Rule 14—1 adopted the latter interpretation, (Ill. Rev. Stat. 1965, chap. 110, par. 101. 14—1.) and the defendant challenges its constitutionality.

Rule 14—I did not, as the defendants urge, conflict with the language of paragraph 8 of the Schedule. That paragraph continued masters in chancery in office during the interval between the effective date of the new article and the expiration of their terms of office. To authorize masters, during that interval, to conclude matters in which testimony had been received before the effective date, it was not necessary that they be continued in office. Since they were continued in office, no additional explicit authorization was necessary to enable them to hear cases referred to them during that interval. The defendants' reading would render almost meaningless the clause which grants authority to "conclude matters in which testimony has been received", and would convert what is stated as an express grant of authority into an implied limitation. That clause is not surplusage if the word "thereafter" refers to the expiration of the terms of office of masters in chancery. We hold, therefore, that the master had authority to hear the present case.

On the merits the defendants raise another constitutional issue. They assert that the decree of the trial court impaired the obligation of the employment contract by imposing upon the parties conditions to which they did not agree, in lieu of the void conditions contained in the contract. The restraints actually imposed by the injunction differed substantially from those fixed by the contract. The area restriction contained in the contract covered a radius of 30 miles from each of two points which are more than 20 miles apart on a north and south line if Highland Park is the northernmost operation covered in the contract, and 35 miles apart if the plaintiff's wholesale operation in Waukegan is included. The injunction sought by the plaintiff

was limited to a thirty-mile radius from its Evanston office, which was substantially less than the area fixed by the contract. The decree of the trial court further reduced the area limitation, apparently on the ground that the relief sought by the plaintiff was unreasonable, to that area included in a radius of 20 miles from the plaintiff's Evanston office. The duration of the restriction in the contract was unlimited —it covered Hiyane's entire life. The decree of the trial court substantially reduced this limitation; its injunction was operative only for 5 years from the date of the decree.

The validity of a contract in restraint of competition is conditioned upon its reasonableness in terms of its effect upon the parties to the contract and the public. "In determining whether a restraint is reasonable it is necessary to consider whether enforcement will be injurious to the public or cause undue hardship to the promisor, and whether the restraint imposed is greater than is necessary to protect the promisee. *Hursen* v. *Gavin*, 162 Ill. 377; Restatement of the Law, Contracts, secs. 515, 516." *Bauer* v. *Sawyer*, 8 Ill. 2d 351, 355.

When a business is sold, restraints may be imposed to protect the value of the good will transferred, (*Hursen* v. *Gavin*, 162 Ill. 377), and where specialized knowledge, such as secret processes or the like are involved, restraints may protect against the competition resulting from disclosure or appropriation. See, *e.g.*, *Victor Chemical Works* v. *Iliff*, 299 Ill. 532; *Schulenburg* v. *Signatrol, Inc.*, 33 Ill. 2d 379.

Those factors are not present in this case. Here the interest to be protected was the interest of the plaintiff in its customers. Hiyane's work had brought him into close contact with them, and while it does not appear that those contacts were frequent, they were of an intimate and highly

personal character. With respect to those customers whom he fitted with contact lenses, Hiyane was the principal, if not the only, point of contact between the plaintiff and its customers. On the other hand, the record demonstrates that Hiyane was a highly skilled employee whose work was of a superior quality. By the terms of the contract, if he was to utilize that skill, it would be necessary for him to move himself and his family a considerable distance—beyond an area that contains over one half of the population of the State of Illinois, and extends into Wisconsin on the north and Indiana on the south. In that area, there are substantial numbers of ophthalmologists and numerous important medical centers. It is undisputed that over 90% of the plaintiff's customers were referred to it by ophthalmologists.

During Hiyane's employment by the plaintiff, he served from 700 to 800 customers at the plaintiff's Evanston office and almost an equal number at its Highland Park office. He testified that he kept a list of persons for whom he had rendered service while employed by plaintiff, learned their names and came to know their requirements and problems. He also testified that he destroyed the list when he ceased working for the plaintiff. He did mail about 23 announcement cards when he began work with Acro. He testified that the announcements were sent to ophthalmologists and the record does not show that any were received by customers of the plaintiff, with the exception of a single customer who had requested notification if Hiyane changed jobs. The identity and location of the ophthalmologists was not a matter in which the plaintiff had a proprietary interest, and the fact that the ophthalmologists preferred to have Hiyane fit their patients with contact lenses suggests an interest on

the part of the public in the continued availability of his services.

The logic of the constitutional argument urged by the defendants would seem to preclude a court of equity, on constitutional grounds, from any modification of a contract, however slight. Yet as the plaintiff points out, both area and time limitations contained in contracts restraining competition have been modified and enforced by courts of equity. Some courts have refused to modify restrictions that are ancillary to an employment contract, as distinguished from a contract designed to protect good will in the case of the sale of a business, or secret processes or other trade secrets. (See Blake, Employee Agreements Not to Compete, 73 Harv. L.R. 625; 6 Corbin, Contracts, sections 1659-60; Williston, Contracts, sections 1659-60.) In the present case the restrictions clearly extend far beyond those necessary to the protection of any legitimate interest of the plaintiff, and we find it unnecessary to pursue the defendants' constitutional argument.

To stake out unrealistic boundaries in time and space, as the employer did in this case, is to impose upon an employee the risk of proceeding at his peril, or the burden of expensive litigation to ascertain the scope of his obligation. While we do not hold that a court of equity may never modify the restraints embodied in a contract of this type and enforce them as modified, the fairness of the restraint initially imposed is a relevant consideration to a court of equity. We conclude that the restrictions in the employment contract were not reasonably necessary for the protection of the plaintiff.

The decree of the circuit court assessed three fourths of the master's fee against Hiyane. In our opinion this

and other costs should be borne by the plaintiff. The decree of the circuit court of Cook County is reversed, and the cause is remanded to that court with directions to dismiss the complaint for want of equity and to assess the fees of the master in chancery and other costs against the plaintiff.

Reversed and remanded, with directions.

III. Opinion of Illinois Supreme Court, 42 Ill. 2d 45 (1969).

MR. JUSTICE HOUSE delivered the opinion of the court:

This appeal is an aftermath of litigation between the parties to enforce a covenant against a former employee of plaintiff not to compete in the business of selling and servicing optical products, particularly contact lenses. The trial court reduced the area limitation and placed a five-year time limitation on the covenant. It enjoined the former employee William M. Hiyane from dispensing or servicing contact lenses within 20 miles of plaintiff's office for five years and enjoined Acro Contact Lens Service, Inc., the new employer, from employing him in the restricted area during that period. Master's fees of $3,043.25 less the security deposit of defendants of $1,000, were ordered paid, ¼ by plaintiff and ¾ by the former employee. On the first appeal, opinion in which was filed March 29, 1967, we held that the restrictive covenant was unreasonable, reversed the judgment and remanded "with directions to dismiss the complaint for want of equity and to assess the fees of the master in chancery and other costs against the plaintiff." 37 Ill. 2d 32.

On May 6, 1967, defendants moved to retax costs and attached an affidavit certifying costs and expenses incurred in the appeal to this court in the total sum of $16,293.50. They included attorneys' fees of $13,000 and various amounts for printing of briefs, supersedeas bond premiums and travel expenses, together with secretarial service, special paper and "synthesis" in connection with the abstract of record which are in addition to a $400 charge for reproducing the abstract. On the same day they filed a motion to

amend the mandate by including a direction to tax costs in all proceedings, including attorneys' fees, and all costs related to an interlocutory appeal by plaintiff. Both motions were denied by this court on May 11, 1967.

Thereafter, on December 27, 1967, defendants filed suggestions of costs and damages pursuant to section 12 of the act pertaining to injunctions. (Ill. Rev. Stat. 1967, ch. 69, par. 12.) Costs, including court reporter fees of $581.30 and items other than the $35 docket fee, $16 transcript cost and $400 for abstract, were alleged to be $1,288.27, minus a credit for the last three items totaling $451 received from plaintiff. Damages suggested were $1,705.16 (consisting primarily of printing and secretarial services) plus attortoneys' fees of $36,241 ($26,280 of which was alleged to relate to the appeal to this court) and $30,000 for lost business. The trial court dismissed defendants' suggestion of damages by reason of the mandate of this court and directed payment by the plaintiff of additional costs of $21.30, and upon payment of the latter amount in open court the judgment was satisfied. Our jurisdiction is invoked because of alleged constitutional questions.

Defendants argue that our mandate did not preclude them from proceeding on the issue of damages. This flies in the face of the plain language of the mandate which is in the exact language of the directions in the opinion: "to dismiss the complaint for want of equity and to assess the fees of the master in chancery and other costs against the plaintiff." (37 Ill. 2d at p. 40.) As was stated in *Thomas v. Durchslag*, 410 Ill. 363, 365, (where plaintiff sought to contest reimbursement after a prior opinion had held taxes, interest and costs reimbursable and directed conformance with the opinion): "Where, as here, the directions of a re-

viewing court are specific, a positive duty devolves upon the court to which the cause is remanded to enter an order or decree in accordance with the directions contained in the mandate. Precise and unambiguous directions in a mandate must be obeyed." (*Harnof* v. *The Kroger Co.*, 40 Ill. 2d 545; *Fisher* v. *Burks*, 285 Ill. 290.) In this case the trial court properly followed the mandate by refusing to consider the question of damages, set a hearing on costs and entered an order for payment of $21.30 additional to master's costs of $3,043.25 and $451 costs assessed by the clerk of this court and theretofore paid by plaintiff.

Defendants further argue that if they were precluded from a hearing on the issue of damages, which issue "became ripe only on remand," there was a violation of due process. This argument is enlarged by the further assertion of due process violations; (1) by the court's refusal to dissolve the preliminary injunction order thereby preventing them from taking timely action under the Injunction Act and (2) that the dissolution of a permanent injunction on appeal has the same effect as a wrongful preliminary injunction at the completion of a trial of the merits.

At the outset we dispose of the contention that the damage provision of the injunction act applies to permanent as well as temporary injunctions. In *Schien* v. *City of Virden*, 5 Ill. 2d 494, this court squarely held that the purpose of the statute was to provide a summary means of assessing damages for the wrongful issuance of a temporary injunction and that the statute applied only to temporary injunctions. It was there pointed out that in an action for a permanent injunction and a temporary injunction issued prior to a determination on the merits, separate and distinct issues are involved and the issues as to issuance of a temporary in-

junction are not dependent upon the holding on the merits. (See also *United Mail Order, Warehouse & Retail Employees Union* v. *Montgomery Ward & Co.*, 9 Ill. 2d 101). As precedent this court in *Schien* cited *Chicago Title & Trust Co.* v. *De Lesaux*, 336 Ill. 522. Defendants are severely critical of dependence on the *De Lesaux* case as precedent because it was under section 8, not section 12. The difference between the two is that section 8 pertains to injunctions restraining the collection of a judgment while section 12 deals with all other types of injunctions. The two are analogous, however, because each refers to dissolution and envisions dissolution prior to final disposition of the case. We adhere to the established view that damages under section 12 are collectible only for wrongful issuance of temporary injunctions, when properly sought.

The question then is whether, in the posture of this case, defendants are entitled to be heard on the question of damages by virtue of the order for a temporary injunction. Plaintiff prayed that defendant Hiyane be temporarily restrained from engaging in the same or similar business, that Acro be enjoined from employing Hiyane, that the temporary injunction be made permanent and for judgment for monetary damage suffered. The injunctive relief prayed was denied, but an order was entered granting a temporary injunction against Hiyane only enjoining him from soliciting patients or customers he served while in plaintiff's employ until "termination of a full and complete hearing by the master," upon the deposit of a $1,000 bond. In the same order the court found the restrictive covenant unenforceable and void. No motion was then filed alleging the injunction to have been wrongfully issued and requesting its dissolution (nor was one ever filed). Plaintiff appealed to

the Appellate Court, First District, which affirmed issuance of the temporary injunction, but reversed that portion of the order holding the covenant void and remanded with instructions to set the case for full hearing. After that interlocutory appeal the cause was heard on the merits in the trial court which resulted in the judgment reversed on the former appeal to this court.

In order that damages may be recovered, a temporary injunction must be dissolved before final judgment on the merits. As heretofore noted, the purpose of section 12 is "to provide a summary mode of assessing damages for the *wrongful* issuance of a *temporary* injunction upon its *dissolution before final judgment.* * * * If the temporary injunction is not dissolved before the hearing on the merits, if it is merged into the permanent injunction when plaintiff prevails, or if it becomes *functus officio* by reason of the complaint being dismissed there has been no legal determination that it was wrongfully issued and there can be no assessment of damages by this summary procedure. *Schuler* v. *Wolf*, 372 Ill. 386. * * * The language of the statute is clear and unambiguous. It clearly applies only where the injunction 'is dissolved' and 'before finally disposing of the suit'." (*Schien* v. *City of Virden*, 5 Ill. 2d 494, 503-504.) Similarly, in *United Mail Order Warehouse and Retail Employees Union* v. *Montgomery Ward & Co.*, 9 Ill. 2d 101 (even though a permanent injunction was there finally granted), it was held that since the temporary injunction was not dissolved before determination on the merits damages could not be recovered.

Here, no motion was ever made by defendants to dissolve the temporary injunction until after a holding on the merits. The motion at the hearing on the suggestion of

damages (not appearing of record but conceded by plaintiff to have been made) came too late. There was no violation of due process either in this court's remandment for assessment of costs only or in the trial court's refusal to hear evidence of damages. Our procedure under the statute gave defendants ample opportunity to seek dissolution of the temporary injunction in apt time thereby giving them an opportunity to be heard on the question of damages suffered in securing dissolution.

Defendants next raise the issue, long settled by this court to the contrary (but now clothed in due process terms) that the eventual successful litigant should receive indemnification of all attorneys' fees and actual expenses reasonably incurred in enforcing his rights. They recognize that in this country, contrary to the English system, the idea has had scant acceptance. Apparently to avoid the view that this is a legislative matter, they suggest that this court has the power to make the change through its rule-making power. The constitutional argument seems to be that Illinois "and the rest of the States" tend to discourage persons from seeking vindication because they cannot be made whole. This and similar arguments have often been made without avail. (See *Fleichmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714. 18 L. Ed. 2d 475, 87 S. Ct. 1404.) Our oft-stated view is that, in the absence of statute (with exceptions not here germane), attorneys' fees and the ordinary expenses and burdens of litigation are not allowable to the successful party. (*Scherzer* v. *Keller*, 321 Ill. 324; *Patterson* v. *Northern Trust Co.*, 286 Ill. 564; *Ritter* v. *Ritter*, 381 Ill. 549.) It is unnecessary to comment upon our rule-making power since we are not disposed to change a doctrine so ingrained in our system of jurisprudence.

While not necessary to a decision in this case, we point out that the mandate sought by defendants (directing indemnification of *all* attorneys' fees, expenses and court costs incurred by them from the beginning of this case to and including those relating to this third appeal) goes far beyond reimbursement permitted under section 12. It must be confined to those expenses necessarily incurred in procuring the dissolution of the temporary injunction. *Scherzer* v. *Keller*, 321 Ill. 324.

The ruling of the circuit court of Cook County is correct and its judgment is affirmed.

Judgment affirmed.

IV. Order entered February 2, 1968, Circuit Court of Cook County, Illinois:

Order.

This matter having been argued by counsel for both parties, and the Court being fully advised, orders:

1. In accordance with the Mandate of the Supreme Court of Illinois, the complaint filed in this cause is dismissed for want of equity.

2. The oral motion of the defendants to dissolve the temporary restraining order against solicitation entered herein on October 6, 1964, is denied because dissolution of the temporary injunction is unnecessary after dismissal for want of equity.

3. Defendants' Suggestion for Damages is dismissed.

4. Defendants' Suggestion for Costs is set for hearing for February 16, 1968 at 10:30 A. M.

Febr. 2, 1968.

ENTER:

GEORGE N. LEIGHTON,
Judge of the Circuit Court.

Objected to as to form
2 February 1968.
L. ROSE, *defendant's attorney.*

V. Order entered February 2, 1968, Circuit Court of Cook County, Illinois:

Order.

This matter having been argued by counsel for both parties, and the Court being fully advised, ORDERS:

1. Defendants' Suggestion of Damages is dismissed because the Court lacks jurisdiction to assess damages pursuant to Illinois Revised Statutes, Chapter 69, Section 12, by reason of the Mandate of the Supreme Court of Illinois which contains no direction to the Court to assess damages;

2. The oral motion of the defendants to dissolve the temporary restraining order against solicitation entered herein on 6 October 1964 is DENIED;

3. In accordance with the Mandate of the Supreme Court of Illinois, the complaint filed in this cause is dismissed for want of equity;

4. Defendants' Suggestion of Costs is set for hearing on February 16, 1968 at 10:30 A. M.

2 February 1968.

ENTER:

GEORGE N. LEIGHTON,
Judge of the Circuit Court.

VI. Order entered February 16, 1968, Circuit Court of Cook County, Illinois:

Order.

This matter having come on to be heard on the defendants' suggestion for costs heretofore filed herein,

The Court having heard statements of counsel and being fully advised in the premises,

It is hereby ordered that the defendants have and recover from the plaintiff, as costs the sum of $21.30, and

It appearing that the said sum of $21.30 was paid in open court by the plaintiff to the defendants,

It is further ordered that the foregoing judgment be and the same is hereby satisfied of record.

February 16, 1968.

ENTER:

GEORGE N. LEIGHTON,
Judge of the Circuit Court.

VII. Order entered February 23, 1968, Circuit Court of Cook County, Illinois:

Order.

This matter having come on to be heard on the Motion of the Defendants heretofore filed herein, to vacate the two Orders entered herein on February 2, 1968; and

The Court having heard arguments of Counsel and being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED, that the said Motion be and the same is hereby denied; the court having fully considered the constitutional questions raised and ruled on them.

IT IS FURTHER ORDERED AND ADJUDGED that the Motion of the Defendant to Re-tax Costs, this day filed herein, be and the said Motion is hereby denied.

Dated: February 23, 1968.

ENTER:

GEORGE N. LEIGHTON,
Judge of the Circuit Court.

APPENDIX B.

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. Constitution.

NINTH AMENDMENT:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

Illinois Constitution.

ART. II, Section 2. No person shall be deprived of life, liberty or property, without due process of law.

ART. II, Section 19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

ILLINOIS STATUTORY PROVISIONS INVOLVED.

Ill. Rev. Stat. (1967), Chapter 69—Injunctions.

Act of March 25, 1874.

§ 1. Power of circuit court.
§ 2. Repealed.
§ 3. Preliminary injunction—notice of application.
§ 3—1. Temporary Restraining Order; Notice; Hearing; Duration.
§ 4. To stay suit or judgment.
§ 5. Release of errors.
§ 6. Repealed.
§ 7. What part of judgment may be enjoined.
§ 8. Bond when judgment enjoined—damages.
§ 9. Bond in other cases—liability of surety.
§ 10. Bond, who may take.
§ 11. Bond to be filed.
§ 12. Assessing damages—suit on bond.
§§ 13, 14. Repealed.
§ 15. Motion to dissolve at any time.
§ 16. Motion to dissolve—evidence.
§ 17. Affidavits.
§§ 18, 19. Repealed.
§ 20. Depositions read in final hearing.
§ 21. Effect of appeal in injunction.
§ 22. Further bond.
§ 23. Injunctions on Sunday.

AN ACT to revise the law in relation to injunction. [Approved March 25, 1874. R. S. 1874, p. 579.]

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. *Power of circuit court.* § 1. The circuit courts shall have power to grant writs of injunction. As amended by act approved Aug. 24, 1965. L. 1965, p. 3562.

Section 2. Repealed by Act filed July 13, 1939. L. 1939, p. 1167.

Section 3. *Preliminary injunction—Notice of application.* No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. As amended by act approved Aug. 7, 1967. L. 1967, p. —, H. B. No. 623.

Section 3—1. *Temporary Restraining Order; Notice; Hearing; Duration.* No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and

why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Added

by act approved Aug. 7, 1967. L. 1967, p. ....., H. B. No. 623.

Section 4. *To stay suit or judgment.* When an injunction shall be granted to stay a suit or judgment at law, the proceeding shall be had in the county where the judgment was obtained, or the suit is pending; but the writ may be sent in the first instance into any county in this state where the defendants reside.

Section 5. *Release of errors.* Every injunction, when granted, shall operate as a release of all errors in the proceedings at law that are prayed to be enjoined.

Section 6. Repealed by act approved Sept. 7, 1967. L. 1967, p. ....., S. B. No. 1053.

Section 7. *What part of judgment may be enjoined.* Only so much of any judgment at law shall be enjoined as the plaintiff shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs. [As amended by act approved June 28, 1935. L. 1935, p. 914]

Section 8. *Bond when judgment enjoined—Damages.* Before an injunction shall issue to enjoin a judgment, the plaintiff shall give bond to the owner thereof, in double the amount of such judgment, with sufficient surety approved by the court or judge, conditioned for the payment of all moneys and costs due to the owner of the judgment, and such damages as may be awarded against the plaintiff in case the injunction is dissolved. No such bond shall be required of any governmental office or agency. If the injunction is dissolved in the whole or in part, the plaintiff shall pay, exclusive of legal interest and costs, such damages as the court awards, not exceeding ten per centum,

on such part as is released from the injunction. As amended by act approved Aug. 7, 1967. L. 1967, p. ....., H.B. No. 623.

Section 9. *Bond in other cases—Liability of surety.* In all other cases, before a restraining order or an injunction may issue, the applicant shall give bond in such sum, upon such condition and with such security as may be deemed proper by the court or judge, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

No such bond shall be required of any governmental office or agency.

A surety upon a bond or undertaking under this Act submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known. As amended by act approved Aug. 7, 1967. L. 1967, p. ....., H. B. No. 623.

Section 10. *Bond who may take.* The bond may be entered into before the court or judge granting or ordering the injunction, or before the clerk of the court, if the court or judge has approved the security. As amended by act approved May 26, 1943. L. 1943, vol. 1, p. 815.

Section 11. *Bond to be filed.* All bonds required by this act shall be filed with the clerk of the court to which the writ is returnable, before such writ shall issue.

Section 12. *Assessing damages—Suit on bond.* In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond.

Sections 13, 14. Repealed by Act approved June 21, 1933. L. 1933, p. 647, effective Jan. 1, 1934.

Section 15. *Motion to dissolve at any time.* A motion to dissolve an injunction may be made at any time upon answer, or for want of equity on the face of the complaint. [As amended by act approved June 28, 1935. L. 1935, p. 914.]

Section 16. *Motion to dissolve—Evidence.* Upon a motion to dissolve an injunction after answer, the court shall not be bound to take the answer as absolutely true, but shall decide the motion upon the weight of the testimony.

Section 17. *Affidavits.* The plaintiff may support his complaint and the defendant may support his answer by affidavits filed with the same, which may be read in evidence on the hearing of the motion to dissolve the injunction. [As amended by act approved June 28, 1935. L. 1935, p. 914.]

Section 18. Repealed. Act approved June 23, 1933, L. 1933, p. 785, effective Jan. 1, 1934.

Section 19. Repealed. Act approved June 28, 1935. L. 1935, p. 914.

Section 20. *Depositions read in final hearing.* Depositions taken upon a motion to dissolve an injunction may be read in the final hearing of the cause.

Section 21. *Effect of appeal in injunction.* No appeal from a decree dissolving an injunction shall have the effect to continue in force the injunction unless the notice of appeal is filed and served and proof of service made within 20 days of the date of the entering of such decree, and the court entering the decree shall, in its discretion on good cause shown, so order, or unless the party prosecuting the appeal shall, within 10 days after notice of appeal is filed, procure from the reviewing court, if in session, or a judge thereof, an order directing that the appeal shall have the effect to continue such injunction in force; and no such order shall be granted except on bond being filed as directed by either the trial or reviewing court and except for good cause appearing in the record, nor when the complaint is dismissed by the plaintiff. The reviewing court, or a judge thereof, may for good cause extend the time for procuring such order. As amended by act approved Sept. 7, 1967. L. 1967, p. ..... , S. B. No. 1053.

Section 22. *Further bond.* The court or judge granting the order for the continuance in force of any such injunction may require, as a condition of granting the same, such further bond and security, to be filed with the clerk of the reviewing court, as may be deemed equitable. [As amended by act approved June 28, 1935. L. 1935, p. 914.]

Section 23. *Injunctions on Sunday.* When an application shall be made on a Sunday for a writ of injunction, and

there shall be filed with the complaint an affidavit of the plaintiff, or his, her or their agent or attorney, stating that the benefits of an injunction will be lost or endangered, or irremediable damage occasioned unless such writ be immediately issued, and giving the reasons for such statement, then it shall be lawful for any officer who is authorized by the law of this State to grant writs of injunction, if it appears to him from such affidavit that the benefits of an injunction will be lost or endangered, or irremediable damage occasioned unless such writ be immediately issued, and if the plaintiff otherwise be entitled to such writ under the law, to grant a writ of injunction on a Sunday; and it shall be lawful for the clerk to issue, and for the sheriff or coroner to serve such writ of injunction on a Sunday as on any other day, and all affidavits and bonds made and proceedings had in such case shall have the same force and effect as if made or had on any other day. [As amended by act approved June 28, 1935. L. 1935, p. 914.]

Ill. Rev. Stat. (1967), Chapter 110—Practice.

Section 2. *Power of courts to make rules.* (1) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to but not inconsistent with the provision of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in respect of small claims, including service of process in connection therewith. Unless otherwise indicated by the text, references in this Act to rules are to rules of the Supreme Court.

(2) Subject to rules the Circuit and Appellate Courts may make rules regulating their dockets, calendars, and business. As amended by act approved Aug. 9, 1963. L. 1963, p. 2691. Effective Jan. 1, 1964.

Section 3. *Enforcement of act and rules.* The Supreme Court may provide by rule for the orderly and expeditious administration and enforcement of this Act and of the rules adopted hereunder, including the striking of pleadings, the dismissal of claims, the entry of defaults, the assessment of costs, the assessment against an offending party of the reasonable expenses, including attorney's fees, which any violation causes another party to incur, or other action that may be appropriate. As amended by act approved July 19, 1955. L. 1955, p. 2238.

Section 4. *Act to be liberally construed.* This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Act or to the rules made pursuant thereto.

No statute hereafter enacted shall be construed to limit or affect the provisions of this Act or the rules adopted in accordance herewith, unless expressly declared to supersede or take precedence of designated provisions thereof or designated rules adopted pursuant thereto. As amended by act approved July 19, 1955. L. 1955, p. 2238.

Section 46. *Amendments.*

(1) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or de-

fendant, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand.

(2) The cause of action, cross demand or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross demand interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving as aforesaid the cause of action, cross demand or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading, shall be held to relate back to the date of the filing of the original pleading so amended.

(3) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.

Ill. Rev. Stat. (1967), Chapter 33—Costs.

Section 8. *Defendant—Recovery of costs.* If any person shall sue in any court of this state, in any action, wherein the plaintiff might have costs in case judgment be given for him, and he be nonpros'd, or suffer a discontinuance, or be non-suited after appearance of the defendant, or a verdict pass against him, then the defendant shall have judgment to recover his costs against the plaintiff (except against executors or administrators prosecuting in the right of their testator or intestate), to be taxed, and the same shall be recovered of the plaintiff, by like process as the plaintiff might have had against the defendant, in case judgment had been given for such plaintiff. As amended by act approved Sept. 7, 1967. L. 1967, p. , S. B. No. 1030.

Section 22. *In appeals; etc., to supreme court.* If any person shall take an appeal, to review the judgment of any other court, and the same judgment be affirmed or the appellant be non-suited, the appellee shall recover his costs, and have execution therefor; and if the judgment be reversed, the appellant shall recover his costs, and shall have execution therefor, as in other cases. As amended by act approved Sept. 7, 1967. L. 1967, p. , S. B. No. 1030.

ILLINOIS SUPREME COURT RULES* INVOLVED.

(*Codified at Ill. Rev. Stat. (1967), Chapter 110A.)

Illinois Supreme Court Rule 208.

Fees and Charges; Copies. (a) Who Shall Pay. The party at whose instance the deposition is taken shall pay the fees of the witness and of the officer and the charges of the stenographer for attending. The party at whose request a deposition is transcribed and filed shall pay the charges for transcription and filing. If, however, the scope of the examination by any other party exceeds the scope of examination by the party at whose instance the deposition is taken, the fees and charges due to the excess shall be summarily taxed by the court and paid by the other party.

(b) Amount. The officer taking and certifying a deposition is entitled to any fees provided by statute, together with the reasonable and necessary charges for a stenographer for attending and transcribing the deposition. Every witness attending before the officer is entitled to the fees and mileage allowance provided by statute for witnesses attending courts in this state.

(c) Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(d) Taxing as Costs. The aforesaid fees and charges may in the discretion of the trial court be taxed as costs.

Illinois Supreme Court Rule 318.

General Rules Governing All Appeals from the Appellate Court to the Supreme Court

(a) Relief to Other Parties. In all appeals, by whatever method, from the Appellate Court to the Supreme Court, any appellee, respondent, or co-party may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross appeal or separate appeal.

(b) Interlocutory Review. The review of cases at an interlocutory stage is not favored, and a failure to seek review when the Appellate Court's disposition of the case is not final does not constitute a waiver of the right to present any issue in the appropriate court thereafter.

(c) Appellate Court Briefs. If it is important for the Supreme Court to know the contentions of any party in the Appellate Court, copies of the pertinent Appellate Court briefs certified by the clerk of that court may be filed in the Supreme Court.

(d) Fees. In appeals taken from the Appellate Court, the clerk of that court is entitled to receive from the party appealing only the fees allowed by law for his certificate and copy of proceedings had in the Appellate Court and the reasonable cost of sending the record from his office, either by mail or express, to the clerk of the Supreme Court.

Illinois Supreme Court Rule 330.

Costs of Unnecessary Matter Incorporated in Record on Appeal

The entire expense of incorporating unnecessary and immaterial matter in the record on appeal may be assessed by the reviewing court as costs against the party who designated that matter, irrespective of how the appeal is decided.

Illinois Supreme Court Rule 342.

Excerpts from Record or Abstract

(a) . . . .

(b) . . . .

(c) . . . .

(d) . . . .

(e) . . . .

(f) . . . .

(g) . . . .

(h) Costs. The cost of producing the excerpts from record shall initially be paid by the appellant, but if the appellant considers parts of the record designated by the appellee unnecessary for a determination of the issues presented by the appeal, he may so advise the appellee in writing and within seven days the appellee shall advance the cost of producing such parts, in default of which the appellant shall either reproduce the material designated by the appellee or seek instructions from the reviewing court or a judge thereof. The actual and reasonable cost of producing the excerpts from record or the abstract or additional abstract, proved by affidavit satisfactory to the clerk of the reviewing court, shall be taxed as costs in the case;

but if either party causes matter to be unnecessarily included in the excerpts from record, the court, irrespective of how the appeal is decided, may impose the cost of producing such matter on the party or his counsel; and the cost of including unnecessary matter in the abstract or additional abstract may be disallowed as costs.

Illinois Supreme Court Rule 364.

Security for Costs on Appeal

In any appeal to a reviewing court in a civil action, upon the filing by the appellee of an affidavit that any appellant is not a resident of this state or is insolvent and that no bond for costs has been filed, with proof of service of a copy of the affidavit, a rule shall be entered against the appellant to show cause why the appeal should not be dismissed.

FILED
AUG 5 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 320

WILLIAM M. HIYANE AND
ACRO CONTACT LENS SERVICE, INC.,
AN ILLINOIS CORPORATION,

Appellants,

vs.

THE HOUSE OF VISION, INC.,
A DELAWARE CORPORATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF ILLINOIS

MOTION OF APPELLEE TO DISMISS APPEAL, OR IN ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

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The appellee moves the Court, pursuant to Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Illinois, on the following grounds:

1. At no time throughout the proceeding below was the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States.

SUPREME COURT OF THE UNITED STATES